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DEPARTMENT OF NATURAL RESOURCES  
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WATER RIGHTS  
SALT LAKE

3 September 2004

RICH RUSSELL  
PO BOX 1647  
COLUMBIA FALLS MT 59912

RE: **INQUIRY REGARDING WATER RIGHTS 81-3026, 81-3027, 81-3045**

Mr. Russell:

Your referenced inquiry dated 01 August 2004 was received in this office on 04 August 2004. I apologize for the delay in replying to your inquiry. The Division of Water Rights ("Division") is currently contemplating adoption of specific policy guidelines pertinent to the type of rights addressed in your inquiry. I delayed responding to your questions hoping some decisions in that regard would enable a more specific and certain response. However, due to the press of other work, the subject policy guidelines have not been finalized as of this date.

The three referenced water rights are all described in the "*Proposed Determination of Water Rights / The Virgin River Drainage Area / East Fork Virgin River Division / Code No. 81 / Book No. 2*" published in 1992. Attached are database printouts of the subject rights as currently defined in the Division's records. Please note two points pertinent to your inquiry:

1. Your associates (James B. & Patricia M. Kearns) do not appear to hold any ownership interest in Water Right 81-3027;
2. All three rights are identified as "Class 2" rights arising from the so-called Virgin River Decree.

The second point is most critical in that it pertains to the relative priority date associated with these rights (1900) and is a primary point of consideration in the Division's efforts to establish an equitable and manageable set of policy guidelines for evaluating applications of the type you describe in your letter.

Having laid that groundwork, let me address each paragraph of your letter in turn:

¶ 1: As I am not familiar with Montana's statutes and regulations governing water rights, I am not conversant with the degree to which they are comparable to Utah's. Hopefully there is enough similarity that any technical jargon employed in our correspondence will not lead to misunderstandings.

¶ 2 & 3: As you have correctly indicated, the legal process for converting the Kearns' irrigation rights for domestic use(s) from other sources (springs, streams or wells) is through the filing of one or more "Application(s) for Permanent Change of Water" ("change application(s)") which describe the proposed change in point of diversion, place of use and/or nature of use. As to whether it is more desirable for the Kearns to file such applications themselves (and then convey interests to parties purchasing the referenced "lots") or whether to simply convey interests in the underlying right(s) (and then allow the purchasers to file their own change applications) is a matter of choice and circumstances.

For several reasons which I will not detail at this time, the latter option tends to be preferable and less prone to causing problems unless the Kearns intend to develop a community-type water system operated by a corporate entity (e.g., mutual non-profit water users association; private for-profit water company; etc.) and distribute "shares" to those to be served by the system.

¶ 4: Your reference to the "Proposed Determination of Water Rights / The Virgin River Drainage Area / Zion National Park Division / Area No. 81 / Book No. 6", published in 2000, is noted. As you likely realize, this document is the basis for settlement of the federal reserved water right for Zion National Park. A major element of that settlement consists of establishing limitations on future and new impoundments, diversions and depletions of surface and ground water from drainages located up-gradient from the park. At §II.A, the reserved right is subordinated to ". . . all valid existing perfected water rights. . ." which would include the subject rights. (See also §II.C.1) The definition of shallow wells within the 500-year floodplains of the subject streams as "surface water" (§IV) appears to apply only to "new" (§IV) diversions. However, it is my understanding that the limitations on ground water development defined at §II.B.3 have been construed to apply to any "new" wells proposed under change applications, even if such applications are based on pre-existing perfected underlying rights.

¶ 5: This paragraph gets to the real meat of our current deliberations regarding applications of the type the Kearns are contemplating. Under Utah's water rights statutes as interpreted in various court decisions, a water right may not be "enlarged" nor "bettered" by virtue of a change application. Thus, any change application proposing a change in point of diversion – and especially if moving from a surface supply to an underground supply – merits close scrutiny to assure that the change does not enlarge nor better the underlying right and that the change in source does not incur the effects of a new appropriation due to relative hydrologic isolation of the historic source from the proposed source. If the Kearns opt to file change applications of the type you discuss, they will likely be required to submit detailed information regarding termination of the historic beneficial use, the hydrologic connection between the historic and proposed sources, an acknowledgment of the inferior priority of the Class 2 rights and a plan to terminate water use during periods when such rights are not deliverable, and a plan/agreement pertaining to perpetual metering and reporting of water diversions for domestic purposes.

Mr. Kearns is correct that the current standard for a seasonal/recreation domestic (indoor) water right is 0.25 acre-foot, equal to an irrigation right for 0.0833 acre under the subject rights. Providing that all other issues can be adequately addressed, the Kearns water right interests appear to be adequate for a substantial number of such domestic uses.

¶ 6: You will find the standard change application form is available as a PDF file on our Division website at: <http://www.waterrights.utah.gov/wrinfo/forms/default.asp> (listed in the

drop-down menu as "Change Application"; it is necessary to print the form and complete it manually). Because the Kearns do not hold title to 100% of the subject rights, if they opt to file any applications, our office will administratively "segregate" and re-number the portions to be changed. Items 1-13 in the change application form are to be taken directly from the underlying water right ("heretofore"); items 14-24 are completed to describe the changes to be made in the right ("hereafter"). In most instances, we find it most efficient if applicants will simply provide the hereafter information and we then produce a completed application utilizing our computerized database system.

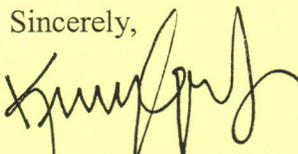
Typically, change applications also require the submission of two maps: a "heretofore" map depicting the manner/extent in which the historic use will be terminated or reduced; a "hereafter" map indicating the parcel(s) of land to which the approved application will become legally appurtenant if/when approved (see §73-1-11, Utah Code Ann.). Additional general information is available at: <http://www.waterrights.utah.gov/wrinfo/policy/topic.htm> Use the drop-down menu to select topic(s) of interest (e.g., "Map Submittal and Standards").

¶ 7: Hydrographic survey maps depicting the points of diversion and places of use of the subject right are available as scanned documents from the Division website at: <http://www.waterrights.utah.gov/cgi-bin/docview.exe?Folder=ADM81BK02>

I have highlighted the map numbers for the subject rights on the database printouts enclosed herewith. The map number is determined by location of the point of diversion and the map selected may not include any or all of the place(s) of use.

Our office does not currently have access to maps depicting the 500-year floodplain of the area in question. As previously noted, the pertinence of this issue is not presently clear. If/when the Kearns opt to file change applications, we will likely have to determine whether the special definition of "surface water" has any bearing thereon.

Sincerely,



Kerry Carpenter, P.E.  
Region Engineer

pc: Files 81-3026, 3027, 3045  
Kent L. Jones, P.E. / Assistant State Engineer – Appropriations  
Lee H. Sim, P.E. / Assistant State Engineer - Distribution

Encl: dB printouts (3)

NOTICE

No agency of the State of Utah warrants or guarantees title to certain water rights. The State Engineer's Office / Division of Water Rights serves only as an office of public record. The water right ownership information provided here reflects that which has been filed with the Division by the public. If an opinion of title assurance is desired, an attorney or other qualified professional should be retained.